IN THE

Supreme Court of the United States

October Term, 1978

No. 78-303

WILLIAM E. COLBY, and
VERNON A. WALTERS,

Petitioners,

v.

RODNEY DRIVER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-20a) is reported at 577 F.2d 147. The opinion of the district court (Pet. App. B, pp. 21a-69a) is reported at 74 F.R.D. 382.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 72) was entered on May 25, 1978. The petition for a Writ of Certiorari was filed on August 22, 1978 and was granted on January 15, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e), grants the district court nationwide *in personam* jurisdiction over federal officials sued for damages in their personal capacities, and not "nominally" in suits "in essence against the United States", for acts performed under color of law.

2. Whether such a grant of *in personam* jurisdiction would violate the due process clause of the fifth amendment.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Mandamus and Venue Act of 1962, as amended, is codified in Title 28, and provides:

> "§1361. Action to compel an officer of the United States to perform his duty
>
> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."
>
> "§1391. Venue generally
>
> * * * *
>
> "(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The fifth amendment provides, in part:

> "No person shall ... be deprived of life, liberty, or property, without due process of law...."

STATEMENT [1]

This action, brought in the district of Rhode Island, seeks damages in excess of $1 billion against 25 present and former federal officials, sued individually in their personal and in their official or "former official" capacities.

Respondents purport to represent a class of "tens of thousands" whose mail was intercepted in New York, opened, read and copied in violation of the first, fourth, fifth and ninth amendments, and various federal statutes.

Petitioners, together with other defendants, moved to dismiss the complaint for lack of *in personam* jurisdiction because they were not served with process in Rhode Island, did not reside in or have affiliation with Rhode Island and the complaint does not allege that any unlawful activity occurred in Rhode Island.

The district court denied the motion, holding that 28 U.S.C. §1391(e) grants the district court nationwide *in personam* jurisdiction over officials sued for damages in

1. This case is docketed for argument in tandem with *Stafford* v. *Briggs*, No. 77-1546, which raises the same issues.

their personal capacities for acts allegedly performed while they were in office. The court of appeals affirmed in part and reversed in part. It held that Section 1391(e) grants such nationwide *in personam* jurisdiction, but applies only to persons, like petitioners, who, at the time the action was brought, were serving the government in the capacity in which they performed the acts on which their alleged liability is based.

The events giving rise to this lawsuit are generally referred to as the East Coast Mail Intercept, during which the Central Intelligence Agency ("CIA") inspected selected pieces of first-class mail destined to or originating in the Soviet Union from 1953 to 1973. These events are detailed in the Report to the President by the Commission on CIA Activities, dated June 6, 1975, and the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report, Book III, at 559-679, S. Rep. No. 94-755, 94th Cong., 2nd Session (1976) ("Senate Intelligence Report").

Respondents are five United States citizens, one of whom resides in the selected forum. All of the respondents brought actions against the United States under the Federal Tort Claims Act seeking damages based upon identical allegations of wrongdoing. [2]

2. *Birnbaum (Avery)* v. *United States*, Slip op. at 5101, No. 77-6181 (2d Cir. November 9, 1978); *Avery* v. *United States*, 434 F.Supp. 937 (D. Conn. 1977); *Driver* v. *United States*, 77 Civ. 919 (E.D.N.Y.); *Wilson* v. *United States*, 77 Civ. 975 (E.D.N.Y.); *Siebel* v. *United States*, No. C-76-1737 (N.D. Cal. December 17, 1976).

In *Birnbaum*, *supra*, the court said:

> "That is as it should be. The CIA agent who, in other days, might have been a candidate for a citation of merit, should not now be made to suffer alone an ignominious financial ruin. . . .
>
> "The responsibility is lodged, under the FTCA, where the careful report of the Attorney General says it belongs - on a diverse and complacent officialdom. Compensation for incidental harm resulting from the Government's pursuit of its security interests is more justly borne by the entire body politic than by agents of the Government, who, out of patriotic zeal, exceeded the outer limits of their delegated authority. So long enduring and pervasive a breach of privacy, in the face of an utter lack of authority, is fittingly a responsibility the United States should assume to compensate the plaintiffs." *Id.* at 5129.

The district court certified the action as a class action pursuant to Rules 23(b)(2) and (3) of the Federal Rules of Civil Procedure. Respondents' complaint seeks damages from petitioners in their personal capacities of $20,000 for each opened letter and $100,000 in punitive damages for each class member, together with injunctive and declaratory relief.

Respondents allege, on information and belief, that the petitioners knew of, participated in, or concealed the alleged unlawful acts.

Petitioner William E. Colby ("Colby") was Deputy Director for Operations of the CIA from March 1973 to August 1973. Colby was appointed Director of Central Intelligence in September of 1973, and held that position when the complaint was filed. In support of his motion to dismiss, Colby's uncontroverted affidavit (App. 19) established that: Colby has never been a domiciliary, resident or citizen of Rhode Island; he never carried on or engaged in any personal business or owned property in Rhode Island; in his official capacity or otherwise, he did not authorize or take part in any action in Rhode Island relating to the acts complained of; he was not aware that any such acts were undertaken by anyone in Rhode Island. The Senate Intelligence Report found that shortly after Colby first learned of the East Coast Mail Intercept he terminated the program. Senate Intelligence Report at 604.

In addition to this damage action in Rhode Island, Colby has also been sued for damages in his personal capacity in federal courts in New York, California and Washington, D.C. based in part on the same allegations of mail intercept. *Grove Press, Inc.* v. *CIA*, 76 Civ. 5509 (S.D.N.Y.); *Kipperman*

v. *McCone*, 422 F. Supp. 860 (N.D. Cal. 1976); *Halkin* v. *Helms*, Civil No. 75-1773 (D.D.C.).

The issues of *in personam* jurisdiction raised in this case have been litigated by Colby in *Grove Press, Inc.* and *Kipperman*. The question was resolved favorably to him in *Kipperman* and is now pending appeal in the United States Court of Appeals for the Second Circuit in *Grove Press, Inc.*, No. 78-6186, after an unfavorable decision in the district court.

Petitioner Vernon A. Walters ("Walters") was appointed Deputy Director of Central Intelligence in May 1972 and was in that office when the complaint was filed. Walters' affidavit (App. 20) established that: Walters has never been a domiciliary, resident or citizen of Rhode Island; he has not engaged in personal business nor owned property in Rhode Island; and he neither authorized nor took part in any act in Rhode Island relating to the complaint. In fact, Walters first learned of the East Coast Mail Intercept only after the program was terminated.

Colby was served with process in this action by personal delivery to the Associate General Counsel of the CIA at his office in Virginia (App. 19). Walters was served by personal delivery to him in Virginia (App. 20).

The district court found that it had *in personam* jurisdiction over petitioners by reason of Section 1391(e), holding that this statute, standing alone, governs not only service of process, but also supplies an independent basis for *in personam* jurisdiction. It held that subjecting federal officials to suit in their personal capacities, notwithstanding their lack of any contact with the forum, was not violative of fifth amendment due process. It also held that Section 1391(e) was applicable to damage actions seeking recovery from an official's own personal resources. Finally, it held that Section 1391(e) is applicable to former federal officials who were not employed by the United States at the time they were served with process.

On interlocutory appeal pursuant to 28 U.S.C. §1292(b), the court of appeals affirmed the judgment of the district court as to petitioners who were CIA officials when the complaint was filed, but reversed as to those defendants below who were "former federal officials" when the complaint was filed.

On the issue of "former officials" the court of appeals found that the operative language of Section 1391(e) precluded its application to them because the section is drafted in the present tense ("defendant is an officer or employee of the United States...acting in his official capacity or under color of legal authority...."). It also found that there was no indication in the legislative history that Section 1391(e) was intended to apply to former officials. *Accord, Lamont* v. *Haig*, Slip op. No. 75-2006 (D.C. Cir. Oct. 16, 1978). As to present officials, the court held that Section 1391(e) is applicable to personal damage actions brought against federal officials. It also held that Section 1391(e) is more than a venue and service of process statute, and that it provides an independent basis for nationwide *in personam* jurisdiction.

Finally, the court of appeals held that fifth amendment due process does not preclude an application of Section 1391(e) which subjects petitioners to nationwide personal jurisdiction in suits for damages in a location where they do not live or have affiliations and where no unlawful act took place.

SUMMARY OF ARGUMENT

The general rule of *in personam* jurisdiction applied in both state and federal courts is that one is subject to jurisdiction where he is "present". Congress has traditionally been sensitive to this rule and has never sought to go beyond it in ordinary civil litigation among private parties. *Robertson* v. *Railroad Labor Board*, 268 U.S. 619 (1925). In

the absence of a clear legislative mandate, the court below has mistakenly interpreted Section 1391(e) as a radical and unprecedented break with the past.

A mere reading of the legislative history and the succinct Congressional reports demonstrates that Congress, on the contrary, intended to avoid such result and confine the venue statute to facilitating review of administrative action. The sponsor of the bill stated he had "no intention of bringing tort actions against individual government employees."

The opinion below, if followed, will render several million federal employees subject to widely scattered personal suits for money damages in federal district court solely because of their federal employment, without regard to the total unsuitability of the forum selected by plaintiff. The vexatious nature of the holding below is readily apparent considering the ease today with which one can commence litigation against an official and charge unlawful conduct.

The holding below cannot be reconciled with the clear wording of the statute involved - the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e). The venue provision, Section 2 (§1391(e)) of the statute, addresses a civil action in which a defendant is a federal official "acting in his official capacity or under color of legal authority." By using the word "acting" and casting the statute in the present, active tense it is clear that Congress intended only to cover actions in the nature of mandamus. This is wholly consistent with Section 1 of the Mandamus and Venue Act of 1962, 28 U.S.C. §1361.

The decision below cannot be reconciled with the purpose of the Mandamus and Venue Act, as expressed in the House and Senate Committee reports, to make it possible to bring actions against officials which formerly could be brought only in the District of Columbia.

The legislative history repeatedly indicates that the Mandamus and Venue Act is not intended to give access to

the federal courts to an action which in 1962 could not be brought only in the District of Columbia. Before the passage of the statute, this suit against petitioners could have been brought in any district in which they resided. Only actions nominally against federal officials were restricted to the District of Columbia.

The legislative history also makes clear that the Mandamus and Venue Act is only intended to apply to actions "in essence against the United States". By using the phrase "under color of legal authority" Congress intended to include only those actions which are brought nominally against an officer in his individual capacity to circumvent what remains of the doctrine of sovereign immunity. Such actions are also in essence against the United States.

This suit against petitioners is not in any sense brought in essence against the United States. This suit obviously seeks money damages from their own personal resources. The difference is critical.

The law in effect in 1962 when the act was passed leads inescapably to the conclusion that Congress could not have intended Section 1391(e) to cover this type of suit which did not arise in the federal courts because of the doctrine of absolute official immunity and the absence of a federal claim. *Cf. Butz* v. *Economou*, 98 S. Ct. 2894 (1978), and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). If Congress intended to take the radical step of subjecting all federal employees to *in personam* jurisdiction in personal damage actions in the 94 United States District Courts throughout the country, Congress certainly would have made its intent clearly known. Furthermore, Congress would have had to consider the substantial constitutional problems involved.

The court below applied the wrong standard in interpreting the statute. In *Robertson* v. *Railroad Labor Board, supra*, this Court cautioned that we cannot lightly assume that Congress intends to depart from the traditional rule of

in personam jurisdiction. Further, an interpretation of the statute which requires resolution of the substantial fifth amendment due process issue violates the principle set forth by Mr. Justice Brandeis in his concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936). In the event that Section 1391(e) does somehow confer nationwide *in personam* jurisdiction over petitioners, its application in this case to petitioners would violate fifth amendment due process. Fifth amendment due process guarantees reasonable access to the courts and a reasonable opportunity to defend. Requiring petitioners to defend themselves in personal damage actions in forums far from home, with which they have no affiliation, and where no unlawful act is alleged to have occurred, places an intolerable burden on their right to defend.

ARGUMENT

I

Section 1391(e) does not apply to damage actions brought against federal officials in their private individual capacities.

The Mandamus and Venue Act of 1962 is not a sweeping grant of *in personam* jurisdiction as envisioned by the court below. The statute is a narrow, technical enactment meant only to enable courts outside the District of Columbia to hear non-statutory review actions brought in essence against the United States. The bill was "directed primarily at facilitating review by the federal courts of administrative actions." *See* House Report No. 1996 at 1, 86th Cong., 2d Sess. (1960); House Report No. 536 at 2, 87th Cong., 1st Sess. (1961); Senate Report No. 1992 at 2, 87th Cong., 2d Sess. (1962).

The statute addresses one who "*is*" an officer or employee "*acting* in his official capacity or under color of legal authority" (emphasis added). The actual wording of the statute cannot be read to cover damage actions brought against officials based on past conduct and which seek recovery from their private resources.

Judge Friendly looked beyond the language of the statute in rejecting an earlier attempt to expand the scope of Section 1391(e). He cautioned that it cannot be construed:

> "simply as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." *Natural Resources Defense Council, Inc.* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972).

When the history of the statute is fairly considered and the narrow problem sought to be remedied is recognized, the error of the decision below clearly emerges.

A. Section 1391(e) is limited to actions in the nature of mandamus, which were formerly restricted to the District of Columbia.

Before the passage of the Mandamus and Venue Act, federal district courts outside the District of Columbia lacked subject matter jurisdiction to direct writs of mandamus to federal officials. Soon after the passage of the Judiciary Act of 1789, 1 Stat. 78, it was held that Congress had not granted the federal trial courts power to issue the writ. *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 503 (1813). The federal courts in the District of Columbia, which inherited the power to issue the writ from the common law of the State of Maryland, were the sole exception to this rule. *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

The result of this historical accident was that virtually all non-statutory review actions had to be brought in the District of Columbia. This presented numerous problems of judicial administration and made it difficult for those living far from Washington to secure relief which only mandamus could provide. Section 1 of the Mandamus and Venue Act, now 28 U.S.C. §1361, alleviated one aspect of this problem by conferring mandamus jurisdiction on every federal district court. *See* House Report No. 536 at 3, 87th Cong., 1st Sess. (1961) ("House Report"). However, this grant of subject matter jurisdiction, standing by itself, was insufficient to permit non-statutory review actions to be maintained outside the District of Columbia because of certain restrictions on service of process and venue.

In most cases which sought mandamus relief, a superior federal official was an indispensible party. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §27.08 (1st ed. 1958). Because of the legal fiction that these officials resided only where they were stationed, usually the District of Columbia, effective service on them could not be made anywhere else. *Martinez* v. *Seaton*, 285 F.2d 587, 589 (10th Cir. 1961).

Finally, because of the venue provisions then in effect, the joinder of such an official restricted the action to the District of Columbia. *See* Note, *Developments in the Law - Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 924 (1957); 28 U.S.C. §1391(b) (1949), *amended in* Pub. L. 89-714, 80 Stat. 1111 (1966).

The statute was meant to do no more than remove these technical impediments, which limited certain actions to the District of Columbia. The House Judiciary Committee, in its report approving the bill, stated:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." House Report at 1.

Virtually the same language was used in the report of the Senate Judiciary Committee. Senate Report No. 1992 at 1, 87th Cong., 2d Sess. (1962) ("Senate Report").

The legislative history of the statute is equally clear about what it was not intended to do:

> "This bill is not intended to give access to the Federal courts to an action which cannot be brought against a Federal official in the U.S. District Court for the District of Columbia." *Id.* at 2. [3]

3. In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), this Court dealt with a claim that the statute covered habeas corpus proceedings, which are technically within the scope of the term "civil action". For the Court, Mr. Justice Douglas wrote:

> "Although by 28 U.S.C. §1391(e) (1964 ed., Supp. V), Congress has provided for nationwide service of process in a civil action in which each defendant is an officer or employee of the United States,' the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. ***That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia.***" *Id.* at 490 n.4 (emphasis added).

In two decisions Judge Friendly, consistent with this legislative history, declined to extend the scope of Section 1391(e) beyond suits which previously could have been brought only in the District of Columbia. *Natural Resources Defense Council, Inc.* v. *TVA*, 459 F.2d 255 (2d Cir. 1972); *Liberation News Service* v. *Eastland*, 426 F.2d 1379. (2d Cir. 1970).

In *Natural Resources Defense Council*, plaintiffs sued the TVA and several of its officials in the Southern District of New York. In opposition to the defendants' motion to dismiss, plaintiffs relied on Section 1391(e) to supply venue. Because the TVA is undoubtedly an "agency of the United States," *Tennessee Valley Authority* v. *Kinzer*, 142 F.2d 833 (6th Cir. 1944), and its personnel are clearly governmental officers or employees, *Posey* v. *Tennessee Valley Authority*, 93 F.2d 726 (5th Cir. 1937), the statute's literal language applies to the suit. The Second Circuit held, however, that the statute was inapplicable because a suit such as this was not, prior to the passage of Section 1391(e), limited to the District of Columbia:

> "It did not come within the "mischief" at which the new statute was directed, and to which the Committee said it was limited. TVA had always been suable, subject to the same venue limitations as any other corporation, not only in its congressionally fixed residence, the Northern District of Alabama, but in any district where it did business. Unlike the local postmaster or federal land agent, it could never have defeated venue in a suit for damages or declaratory or injunctive relief, which was otherwise proper, on a plea that the suit would lie only in the District of Columbia, since it had no superior in the capital." 459 F.2d at 259. [4]

4. *Liberation News Service* reached a similar conclusion. There, plaintiffs brought an action against the members of a Senate Committee and its chief counsel, seeking relief against an allegedly unconstitutional investigation. After reviewing the history of the statute, the court concluded that it did not apply to members of the legislative branch, even though they might be considered "officers of the United States, and thus within the literal language of §1391(e)." *Compare* 426 F.2d at 1384 *with id.* at 1383.

This action against petitioners would not have been restricted to the District of Columbia before the passage of the Mandamus and Venue Act. Federal officers have always been amenable to suit in actions seeking damages for wrongful acts performed under color of law, subject to the ordinary rules governing jurisdiction and venue. Note, *Developments in the Law - Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 832 (1957); *see Mitchell* v. *Harmony*, 54 U.S. (15 How.) 115 (1852).

The legislative history is clear that an action like this, which could always have been brought outside the District, is not governed by Section 1391(e).

In enacting the statute Congress expressed concern with the unfairness which flowed from the requirement that certain actions against federal officials be brought only in the District of Columbia:

> "A person who seeks to have a Federal court compel a Federal official to perform a duty of his office must bring his action in the District Court for the District of Columbia. This the committee considers an unfair imposition upon citizens who seek no more than lawful treatment from their government." House Report at 3; Senate Report at 2-3.

This unfair imposition was never a factor in personal damage actions against federal officials because those suits were never limited to the District of Columbia. To the contrary, requiring a federal official to defend his assets in every district court throughout the nation certainly places an "unfair imposition" on him - an imposition never considered by Congress. Given the express purpose of Section 1391(e), the extreme result reached below cannot be read into the statute.

B. Section 1391(e) is limited to suits brought "in essence against the United States" and only "nominally" against a federal official.

The legislative history makes it apparent that Section 1391(e) applies only to suits which are brought "nominally" against the defendant official and "in essence" against the United States. It does not apply to actions such as this which seek damages from an official's personal resources. The House Report explains:

> "Section 2 is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action which is *essentially against the United States* to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." House Report at 2 (emphasis added); *see* Senate Report at 3-4.

This action against petitioners is not "in essence against the United States"; it seeks a recovery out of their own resources. The only damage actions which are in essence against the United States are those, unlike this case, where the judgment will ultimately "expend itself on the public treasury". *Land* v. *Dollar*, 330 U.S. 731, 738 (1949); *see* 3 K DAVIS, ADMINISTRATIVE LAW TREATISE §27.09 at 610 (1st ed. 1958).

That Section 1391(e) does not apply to damage actions in essence against individual federal officials is apparent on the face of the statute. It is addressed to actions where "a defendant *is* an officer or employee of the United States or any agency thereof *acting* in his official capacity or under color of legal authority." (Emphasis added). The clear import of the use of "is" and "acting", rather than a phrase such as "who has acted", is to limit the statute to suits which seek to control present, ongoing official conduct; a remedy in the nature of mandamus does not include review

of past conduct. *See Howe* v. *Attorney General*, 325 Mass. 268, 90 N.E. 2d 316 (1950); 3 BLACKSTONE, COMMENTARIES at 110-113 (10th ed. 1787).

Respondents do not seek to compel a federal official to perform a duty of his office, but seek damages for the East Coast Mail Intercept which is long since over. The language of the statute, particularly when read together with Section 1361 as it must be, cannot be stretched to cover this action. *Natural Resources Defense Council, Inc.* v. *TVA*, *supra*, at 459 F.2d 258.

In holding that Section 1391(e) is applicable to damage actions in essence against individual federal officials, the court below relied upon the following passage from the legislative history and its reference to damage actions:

> "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report at 3.

The court erred by taking this sentence out of context and reading it in isolation. The sentence begins by addressing "the venue problem" which the House and Senate Judiciary Committees spent a great deal of effort explaining. Referring specifically to this problem, the Committee Reports say the same problem arises in actions seeking damages against federal officials. However, the venue problem does not arise in all such actions and the Committee Reports do not say that Section 1391(e) is to embrace all damage actions against federal officials.

Indeed, the Committee Reports proceed directly to explain the venue problem further and observe of the actions in which the problem arises "in either event, these are actions which are in essence against the United States." House Report at 3; Senate Report at 3. A fair reading of this passage indicates that Section 1391(e) applies only to

those damage actions where the venue problem arose because the action was essentially against the United States.

One of the ordinary functions of mandamus is to force an official to disgorge monies which he is under a ministerial duty to pay, as Judge Prettyman's scholarly opinion demonstrates in *Clackamas County* v. *McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955). [5] Indeed, the case which established the mandamus jurisdiction of the District of Columbia ordered payments to be made by the Postmaster General. *Kendall* v. *United States ex. rel. Stokes, supra.* In such cases, the need to join a superior federal official and the restrictive venue and service provisions then in effect often limited the trial to Washington. *See, e.g., Webster* v. *Fall*, 266 U.S. 507 (1925). In those "damage" actions the official was sued to circumvent the bar of sovereign immunity, but he was not personally liable for the judgment. Only those actions for money judgments in which the official is a nominal defendant are included within the statute.

In fact, when Section 1391(e) was enacted, damage suits such as this action brought in essence against federal officials were unknown in the federal courts. Official immunity was then thought to be so broad as absolutely to

5. Other examples of such relief are actions to compel increased pay for federal employees, *Nat'l Treasury Emp. Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974); to compel the Secretary of the Interior to apportion funds under the Federal Aid to Wildlife Restoration Act, 16 U.S.C. §669 *et seq.*, *Udall* v. *Wisconsin*, 306 F.2d 790 (D.C. Cir. 1962), *cert. denied* 371 U.S. 969 (1963); to pay servicemen their reenlistment bonuses, *Caola* v. *United States*, 404 F. Supp. 1101 (D. Conn. 1975); to compel the Secretary of Health, Education and Welfare to increase AABD cash benefits; *Lyons* v. *Weinberger*, 376 F. Supp. 248 (S.D.N.Y. 1974); to recover benefits under a veteran's insurance policy, *Kapourelos* v. *United States*, 306 F. Supp. 1034 (E.D. Pa. 1969), *aff'd*, 446 F.2d 1181 (3d Cir. 1971); or to compel the corporation of Washington, D. C. to pay one-half of the cost of building a bridge. *United States ex rel. Treasurer of Washington County* v. *Corporation of Washington*, Fed. Cas. No 16,646 (C.C.D.D.C. 1819).

preclude damage recoveries in such cases. *See Barr* v. *Matteo*, 360 U.S. 564 (1959). Even an allegedly unconstitutional imprisonment motivated by malice was held to be absolutely privileged. *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, *J.*). *Cf. Butz* v. *Economou*, 98 S.Ct. 2894 (1978). Similarly, in 1962 it was not established that a federal claim could be stated for wrongs such as those alleged here. *Compare Bell* v. *Hood*, 327 U.S. 678 (1946), *with Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963); *see Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

No tenable reason is suggested why Congress should be presumed to have enacted a statute governing jurisdiction in actions which were then non-existent.

Nor does the statute's use of the phrase "under color of legal authority" bring this case within its ambit. The legislative history is clear that this phrase was used in the act for a narrow purpose which does not embrace suits against a federal official unless they are in essence against the United States:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed Section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. *It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States, but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.* The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions *where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the*

> *venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned."* House Report at 3-4 (emphasis added).

As this passage indicates, the use of "under color of legal authority" was necessary to afford relief to a plaintiff who seeks to control governmental conduct which is technically not "official" because it is beyond the scope of constitutional or statutory authority. *See Ex parte Young*, 209 U.S. 123 (1908). Such language was only intended to accomplish this purpose in actions nominally against an official. To bring damage actions against petitioners within the coverage of Section 1391(e) would be to push it far beyond the bounds recognized by its draftsman.

C. Section 1391(e) is limited to venue and service of process; it does not alone supply *in personam* jurisdiction.

The court of appeals held that petitioners were subject to *in personam* jurisdiction in the District of Rhode Island because they were served with process by mail in Virginia, pursuant to Rule 4 of the Federal Rules of Civil Procedure as modified by the second paragraph of Section 1391(e). The court viewed Section 1391(e) not only as providing a mechanism for service, but as conferring nationwide *in personam* jurisdiction.

On its face Section 1391(e) governs nothing more than the mechanics of service and where process can be delivered; it consequently makes a defendant amenable to suit only when *in personam* jurisdiction is otherwise independently established. *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16, 20 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969); *Smith* v. *Campbell*, 450 F.2d 829 (9th Cir. 1971).

The court below blurred the critical distinction between service of process and *in personam* jurisdiction. The court

held that federal statutes which provide for service of process necessarily imply a grant of *in personam* jurisdiction over any person so served.

It is certainly not the rule that service of process under the federal rules by itself confers *in personam* jurisdiction. *Arrowsmith* v. *United Press International*, 320 F.2d 219, 224-26 (2d Cir. 1963); *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F.2d 103 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1966); 4 C.WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE at 205-06 (1969).

The legislative history of the statute clearly indicates that this service provision was intended only to modify the non-jurisdictional provisions of Rule 4:

> "In order to give effect to the broadened venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a Federal official or agency amenable to suit locally, *the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure."* House Report at 4 (emphasis added).

This language reflects the limited purpose of the statute which is concerned solely with, as the words of the statute indicate, "delivery of the summons and complaint" and not with *in personam* jurisdiction, as the court below concluded. *But see* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1514, n.118 (1962).

The distinction between *in personam* jurisdiction and the mechanisms for service of process have frequently been recognized by Congress. For example, in the District of Columbia Code, Section 13-423 governs "personal jurisdiction based upon conduct" whereas Section 13-431 separately addresses "manner and proof of service."

This Court recognized that Congress has "clearly expressed" any departures from the traditional rules of *in personam* jurisdiction. *Robertson* v. *Railroad Labor Board*, *supra*, 268 U.S. at 627. For example, in Section 10 of the Sherman Act, 15 U.S.C. §10, Congress was specific in providing that nonresidents may be summoned - it did more than merely modify rules governing service of process. There is no similar clear expression regarding Section 1391(e).

It seems evident that when Congress considered the Mandamus and Venue Act it was not concerned with nor did it directly address problems of *in personam* jurisdiction. The problem before Congress concerned only venue and mechanics of service of process. In the cases which Congress addressed, suits in essence against the United States, *in personam* jurisdiction over the superior government officer was not a problem; it already existed by reason of these officers' "presence" throughout the United States. *Strait* v. *Laird*, 406 U.S. 341, 345 (1972).

Given that such officers were subject to *in personam* jurisdiction, the problem remained that the Federal Rules did not permit delivery of process to them other than within the territorial boundaries of Washington, D.C. *E.g.*, *Martinez* v. *Seaton*, 285 F.2d 587, 589 (10th Cir. 1961). All that was required to remedy the problem which concerned Congress was a mechanism which would permit delivery of a summons beyond the territorial limits of the district to effect *in personam* jurisdiction which could otherwise be established.

D. The court below erred in relying upon unpreferred sources of legislative history.

The court below was unable to reconcile its decision with the express purpose of the statute to permit suits which were then restricted to Washington to be brought elsewhere; with the clear legislative intent to limit the statute to actions in essence against the United States; with the actual wording of the statute; and with the failure of the statute to address *in personam* jurisdiction.

The court ultimately rested its decision upon isolated and inconclusive conversations in committee hearings and documents authored by opponents of the statute. Chief among these is a February 28, 1962 letter from Deputy Attorney General Byron R. White to the Chairman of the Committee on the Judiciary which questions the wisdom of the legislation and suggests an entirely revised draft. As this Court recently observed:

> "Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976).

In any event, however much weight this letter should be given in determining legislative intent, upon analysis it is inconclusive. In this letter, the Department of Justice suggested, among other things, that the venue provision be tied "directly" to the Administrative Procedure Act:

> "The Administrative Procedure Act contains an expression of existing congressional purpose relating to review of the acts of Federal officers. For venue reasons, however, practically all proceedings for review under that act must be brought in the District of Columbia. We believe that less confusion will result by tying in this simple venue grant directly to the Administrative Procedure Act. *This unquestionably eliminates suits for money judgments*

> *against officers*, eliminates any question that a discretionary action can be reviewed, and requires an exhaustion of administrative remedies. It will do away with any possible future contention that the legislation was intended to add any additional substantive right of appeal. *It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation.*" Senate Report at 6 (emphasis added).

The court of appeals concluded that since Congress did not adopt this suggestion it must have intended Section 1391(e) to cover personal damage actions. This is too weak a reed upon which to base such a conclusion. Indeed, the paragraph suggests the contrary. It does not propose a change in the legislative purpose, but seeks to clarify it. Among the problems foreseen to be avoided was a future claim that the statute covers actions for money judgments against officers, contrary to the purpose of the sponsors.

The sponsor of the bill, Representative Hamer H. Budge of Idaho, stated in his final words to the House Committee:

> "I have no intention of bringing tort actions against individual government employees. All I am seeking to do is to have the review of their official actions take place in the United States District Court where the determination was made." Hearings on H.R. 10089 Before the House Comm. on the Judiciary (Subcommittee No. 4), 86th Cong., 2d Sess. 102 (June 2, 1960).

Rather than assume that Congress intended Section 1391(e) to cover personal damage actions, it is more likely that Congress believed that the Committee Reports were so clear that they left no basis for the confusion which the Department suggested might arise. *See* 1962 Cong. Record 20,079 (Sept. 20, 1962); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §48.18 (4th ed. Sands 1972). Indeed, this may be the reason that the Committee Reports

stated time and time again that the statute was intended to cover only actions which could have been brought in the District of Columbia and actions brought "in essence against the United States."

The court below frankly observed that "[t]he legislative history of §1391(e) is at best ambiguous ...." Pet. App. A p.9. The relevant inquiry should be how the ambiguity, if it exists, can be resolved. [6]

In *Robertson* v. *Railroad Labor Board*, *supra*, the Court addressed a similar problem. It stated:

> "By the general rule the jurisdiction of a district court *in personam* has been limited to the district of which the defendant is an inhabitant or in which he can be found." 268 U.S. at 627.

Mr. Justice Brandeis then reviewed the instances in which "Congress ... made a few *clearly expressed* and *carefully guarded* exceptions to the general rule...." *Id.* at 624 (emphasis added). He cautioned that:

> "It is not lightly to be assumed that Congress intended to depart from a long established policy." *Id.* at 627.

If Section 1391(e) were a grant of nationwide *in personam* jurisdiction, it would be an unprecedented and radical departure from the general rule which Congress has consistently observed. Indeed, this construction raises "serious doubt of constitutionality" which alone is reason for its rejection. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, *J.*).

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to

6. We do not view the legislative history as ambiguous because of the statute's clearly stated purpose. We raise this question only in the event the Court finds any ambiguity.

induce a court of justice to suppose a design to effect such objects." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 362 (1805).

If there is any ambiguity in the statute, it must be resolved against an expansive jurisdictional construction.

II

The interpretation given to section 1391(e) by the court below would render its application to petitioners unconstitutional since they would be denied due process of law

Congress has traditionally followed the general rule developed at common law that "the jurisdiction of a district court *in personam* is limited to the district of which the defendant is an inhabitant or in which he can be found." *Robertson* v. *Railroad Labor Board, supra*, 268 U.S. at 627. Similarly, the Court has followed this general rule, which now reflects a broader concept of "presence", in determining the jurisdictional reach of federal courts under federal statutes. *Strait* v. *Laird, supra,* 406 U.S. at 345 n.2.

Some federal statutes depart from the general rule, but each is "carefully guarded" so that well developed notions of fundamental fairness to the defendant remain undisturbed. *Robertson* v. *Railroad Labor Board, supra*, 268 U.S. at 624-625, 627; Pet. App. J, pp. 125a-127a. It is for this reason, we submit, that the Court has not decided the precise constitutional issue presented, although this important issue has been identified and decision reserved. *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n.13 (1948). *See Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1270 n.29 (5th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3450 (Jan. 8, 1979). *Cf. Yakus* v. *United States*, 321 U.S. 414, 437 n.5 (1944).

If Section 1391(e) subjects federal officials sued for damages in their personal capacities to *in personam* jurisdiction in every district court throughout the nation, its application to petitioners, with no nexus to the forum, is fundamentally unfair. Petitioners are deprived of fifth amendment due process because of the intolerable burden on their right to defend.

This constitutional question tests the utmost reach of congressional power: whether traditional notions of fair play and substantial justice inherent in the fifth amendment limit the exercise of Congressional power to provide nationwide *in personam* jurisdiction. [7]

Although the contours of due process are not always precise, certain concrete principles have been firmly established.

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.*** Although 'many controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court***'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and *opportunity for hearing appropriate to the nature of the case.*' " *Boddie* v. *Connecticut*, 401 U.S. 371, 377-78 (1971) (emphasis added).

While *Boddie* is a fourteenth amendment case, the opinion makes clear that the right to an opportunity to defend is

7. In *Robertson* v. *Railroad Labor Board, supra*, 268 U.S. at 622, the Court said that "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court." *Accord, Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 442 (1946); *Yakus* v. *United States, supra*, 321 U.S. at 433. The Court has not, however, determined the extent to which fifth amendment due process imposes limitations on the exercise of that power.

central to fifth amendment due process as well. *Id.* at 375; *Yakus* v. *United States, supra*, 321 U.S. at 433, 443-444; American Law Institute, Restatement of the Law (Second), Conflict of Laws §25 (1971).

There has been little written concerning fifth amendment limitations on the exercise of *in personam* jurisdiction. However, useful analogies can be drawn from fourteenth amendment cases. The exercise of *in personam* jurisdiction may not offend "traditional notions of fair play and substantial justice." *E.g., International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

The court of appeals viewed fourteenth amendment cases as totally irrelevant in a fifth amendment context and this, we submit, is error. Other federal courts have asserted differing positions on this issue. *Compare Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975), *with Oxford First Corp.* v. *PNC Liquidating Corp.*, 372 F.Supp. 191, 198 (E.D. Pa. 1974).

The court of appeals did not recognize that the *in personam* reach of the state courts has been examined by this Court on two distinct levels:

The first level deals with the relations among the states in terms of territorial sovereignty. This analysis helps to explain the second level, but it has nothing to do with the fifth amendment problem. Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 791 *et seq.* (1955).

The second level concerns fourteenth amendment due process and the right to defend. This second level analysis is useful in considering fifth amendment limitations on the exercise of Congress' power because it, like the fourteenth amendment, reflects "traditional notions of fair play and substantial justice."

(1) The first level of analysis which the court below appeared to view as the underpinning of the *International Shoe* line of cases does not concern due process at all. Prior

to the adoption of the fourteenth amendment in 1868, a state could render an *in personam* judgment against a non-resident who did not submit to jurisdiction. The effect of such a judgment in the rendering state was solely a matter of that state's law; no protection was afforded to a defendant by the Constitution. *Baker* v. *Baker, Eccles & Co.*, 242 U.S. 394, 402-3 (1917).

Such a judgment was not entitled to full faith and credit outside the rendering state, but this was not due to any constitutional prohibition. Rather, "fundamental principles of justice and the rules of international law as they existed among the States at the inception of the Government", *id.* at 401, permitted sister states to decline to enforce such *in personam* judgments.

The operative rule was that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). The rule regulated the relationships among the states which were viewed as independent sovereigns. An extra-territorial assertion of jurisdiction by one state would offend sister states and exceed the inherent limits of its power. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). Prior to the fourteenth amendment, non-resident defendants derived protection from this rule merely as incidental beneficiaries.

While this principle of sovereignty lost importance after the fourteenth amendment, it continued to be expressed. *Compare Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958), *with Shaffer* v. *Heitner, supra*, 433 U.S. at 204 n.20.

Insofar as this Court's prior decisions concerning the breadth of state *in personam* jurisdiction relied on principles of state sovereignty, they are not relevant to fifth amendment analysis because there is nothing "extra-territorial" about the exercise of nationwide *in personam* jurisdiction by the United States. *Mariash* v. *Morrill*, 496 F.2d 1138 (2d Cir. 1974).

(2) The second level of analysis reflected in the *International Shoe* line of cases treats the due process problem. It concerns limitations on the exercise of *in personam* jurisdiction both within and outside the territory of a state. Since this analysis considers fundamental fairness and not territorial power, it is relevant to both fourteenth and fifth amendment cases.

The fourteenth amendment rendered an *in personam* judgment against a non-resident who did not submit to jurisdiction void in the rendering state:

> "the effect of the 'due process' clause of that Amendment being*** to establish it as the law for all the States that a judgment rendered against a non-resident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the State whose court had rendered it, and to make the assertion of its invalidity a matter of federal right." *Baker* v. *Baker, Eccles & Co., supra*, 242 U.S. at 403.

The Court observed:

> "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." *Id.*

The right to be heard is not satisfied merely by adequate notice. The convenience or hardship of the forum to the defendant is also a factor:

> "To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory." *Id. See also, Roller* v. *Holly*, 176 U.S. 398, 408-9 (1900).

The analysis used in fourteenth amendment cases protects the right to defend from the burden imposed by forcing one to litigate in an inconvenient forum. It is based on considerations of fundamental fairness, not territorial sovereignty, and is applicable to fifth amendment cases.

(3) Contemporary analysis of due process begins with *International Shoe Co.* v. *Washington, supra*, 326 U.S. 310. Its "minimum contacts" test was not grounded upon historical concepts of territorial sovereignty or the *de facto* power which a state may have over a defendant's person. *Id.* at 316. Rather, the demands of due process are satisfied only when it is reasonable to require one to defend a particular suit in a particular forum. *Id.* at 317. As the Court explained:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319.

In setting forth the due process standard the Court employed the analysis of Judge Learned Hand in *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930):

> "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." *International Shoe, supra,* 326 U.S. at 317.

Without a sufficient nexus between the defendant and the forum, to require him to defend away from home "has been thought to lay too great and unreasonable a burden ... to comport with due process." *Id.*

This undue hardship, it is submitted, is as great and unreasonable when it is imposed in federal question cases in the district courts as in the state courts.

The unreasonable burden is prohibited by the fifth amendment for the same reason that it is prohibited by the fourteenth amendment. It imposes an intolerable hardship on the right to defend.

International Shoe recognizes that "presence" in the territory of the forum and its consequent power to assert control over the defendant does not end the jurisdictional inquiry. *Shaffer* v. *Heitner*, *supra*, confirmed this when it rejected the conceptual structure of *Pennoyer* v. *Neff* and recognized that "the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined". 433 U.S. at 211. *Shaffer* concluded that territorial power aside, "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212.

The court of appeals failed to recognize that *International Shoe* and *Shaffer* rely upon doctrines of fundamental fairness, rather than territorial sovereignty.

(4) Since it is burdensome to conduct litigation away from home it is fairer that a plaintiff, who initiates the process by bare allegations, go to the forum of the defendant than that the defendant be required to travel to the plaintiff. *Hutchinson* v. *Chase & Gilbert, Inc.*, *supra*, 45 F.2d at 142.

In *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), the Court recognized "the substantial financial burden and personal strain of litigating" in a state forum 3,000 miles from a defendant's home. In the absence of "affiliating circumstances" connecting the defendant to the forum, basic considerations of fairness require the plaintiff rather than the defendant to assume this burden. *Id.* at 97.

When a plaintiff initiates an action the defendant is immediately subjected to an array of obligations.

> "[T]he successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' right. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." *Boddie* v. *Connecticut*, *supra*, 401 U.S. at 376.

It is evident that full access is not afforded if the defendant must assume an unreasonable hardship in order to be physically present at the place of trial.

Mr. Justice Black recognized that the burdens imposed by distant litigation can be severe: traveling to a strange court in a strange city, inducing witnesses to travel there and to testify, hiring distant and unfamiliar counsel, and paying one's own and their witnesses' hotel bills and other expenses. *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 325-330 (1964) (dissenting). When added to the ordeal of the trial itself, in which one's private assets are at risk, this burden is clearly a serious handicap in presenting an adequate defense. The consequent advantage to the plaintiff places the litigants in such an unequal posture that it denies due process to the defendant.

The right to defend locally has long been recognized as protecting against the power which can be wielded by a vindictive plaintiff. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth And Forum Conveniens*, 65 YALE L. J. 289, 296, *et. seq.* (1956); *See also*, Von Mehren and Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127-1128 (1966). Indeed, the *in terrorem* effect of having to defend far from home and absorb the consequent expense places undue pressure on the defendant to settle groundless claims or forego meritorious defenses. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-41 (1975).

The court of appeals held that Congress can subject a defendant to *in personam* jurisdiction in any federal forum— the degree of the burden imposed on a defendant

whose property may be taken is not relevant. But the implicit premise is that Congress can impose a fundamentally unfair burden on the right to defend.

(5) The court of appeals reasoned that since Congress could draw the boundaries of the federal district courts without regard to state lines there can be no constitutional limitation on the jurisdictional reach of the district courts. Similarly, the court suggested that Congress could reduce the number of district courts, perhaps to one, and in this event permissible nationwide *in personam* jurisdiction would follow. *Cf.* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498 (1974). This reasoning begs the question. [8]

Although Congress may have the power suggested, the pivotal question remains whether the exercise of jurisdiction by any such court would impose an undue hardship on the right to defend and thus violate due process. Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 Wisc. L. Rev. 27, 36. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 437 n.2 (Official Draft 1969).

(6) The court of appeals viewed a motion for change of venue under 28 U.S.C. §1404(a) as an adequate remedy if an exercise of *in personam* jurisdiction is fundamentally unfair. This misapprehends the nature of venue and due process.

Venue concerns the relative convenience of all of the parties and the witnesses. Thus the rule is that "where the transfer would merely shift the inconvenience from one party to the other, the Motion for Change of Venue should be denied." *Crossroads State Bank* v. *Savage*, 436 F. Supp. 743, 745 (W.D. Okla. 1977). The burden on a defendant alone, however great, would not be sufficient to cause a change of

8. This is certainly not a case where a national emergency requires one court to determine a specific class of cases. *Cf. Yakus* v. *United States*, *supra*, at 432-33.

venue. On the other hand, due process considers only the burden on a defendant's opportunity to defend:

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Fuentes* v. *Shevin*, 407 U.S. 67, 90 n.22 (1972).

(7) Finally, the court below suggested that officers of the federal government are different from private defendants because their official acts may affect people in every part of the United States. When a federal employee is sued for damages in his personal capacity in a distant forum he faces the same hardships as any other private defendant. In the face of these hardships, due process is not satisfied merely because a person is employed to serve his government.

The Court in *Shaffer* v. *Heitner* rejected the similar argument that officers of Delaware corporations can be subjected to jurisdiction in Delaware merely because they are officers. The argument simply fails to recognize the requirement of fairness. 433 U.S. at 192. Merely that one is a federal official does not demonstrate that requiring him to defend in a particular forum is fair.

(8) If Section 1391(e) confers nationwide *in personam* jurisdiction, without regard to the burden imposed upon a defendant, it is a radical departure from our traditional notions of fair play. Every nationwide service provision heretofore enacted by Congress has been carefully guarded and restricted to comply with the requirement of fundamental fairness. Foster, *Long-Arm Jurisdiction* in *Federal Courts*, 1969 WISC. L. REV. 27, 34; Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963). If Congress meant to reject its heretofore self-imposed limitations in this sensitive area, it would have made its intentions unmistakably clear.

An interpretation of Section 1391(e) which limits its application to federal officials sued in their official capacities or nominally in their individual capacities in suits in essence against the United States presents no due process problem. In their official capacities, officials are "present" throughout the nation, through the "hierarchy of command", *Strait* v. *Laird, supra*, 406 U.S. at 345; thus no question of fundamental fairness is raised.

To interpret Section 1391(e) as granting *in personam* jurisdiction over officials sued in their personal capacities in any court in the land, without any traditional affiliating circumstances, would be fundamentally unfair and therefore unconstitutional under the due process clause of the fifth amendment.

CONCLUSION

The judgment of the court of appeals, insofar as it affirmed the district court and declined to dismiss the complaint against petitioners, should be reversed.

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